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No. 06-480

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IN THE

Supreme Court of the United States

LELGIN CREATIVE LEATHER PRODUCTS, INC.,
Petitioner,

v.

PSKS, INC. D/B/A KAY'S KLOSET...KAY'S SHOES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

In view of (1) Defendant's participation as a full member in a horizontal price fixing scheme; (2) an unbroken line of cases extending back to *Dr. Miles*, in which this Court has held that written contracts between a manufacturer and a retailer fixing the resale price of a product are illegal *per se* under Section 1 of the Sherman Act; (3) this Court's earlier recognition of Congressional action demonstrating its intent that resale price fixing be treated as illegal *per se*; and (4) Congress's continued refusal to change the *per se* rule for resale price fixing, is it appropriate for this Court even to reconsider the long standing *per se* rule against vertical minimum price fixing?

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that PSKS, Inc., is a family owned corporation. No publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY THE PETITION

Cartels among participants at a single market level are universally condemned in American law. Such cartels are illegal *per se*, and no one argues they should not be.

In this case, Leegin Creative Leather Products, Inc., ("Leegin") both manufactures retail goods and participates in the retail market for goods, owning and operating its own retail stores featuring its Brighton brand products. Because of Leegin's active participation as a retail competitor of the plaintiff, PSKS, Inc., d.b.a., Kay's Kloset * * * Kay's Shoes ("Kay's Kloset") and other retailers, Leegin simply could not legally contract with retailers (Leegin's competitors) to fix the price at which they sold Brighton brand goods. Leegin's

actions run afoul of the long-standing rule against vertical minimum price fixing, and they violate the unquestioned *per se* rule against cartels.

For almost 100 years, since *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), vertical agreements between a manufacturer and a retailer fixing the retail minimum price of consumer goods have been illegal *per se* under the Sherman Act. *Id.* at 404. On several occasions, this Court has reconsidered but always reaffirmed the use of the *per se* rule against vertical minimum price fixing. In doing so, the Court has recognized that Congress plays a primary role in establishing the applicable antitrust policy regarding resale price maintenance. In approving, and later repealing the "Fair Trade Laws,"[1] Congress demonstrated repeatedly its intent that the very actions Leegin undertook here are to be judged illegal *per se*.

Leegin's petition presents none of the traditional reasons for granting a writ. There are no conflicting circuit court decisions on this topic. Instead, there is complete consensus among the circuits, all consistent with the Fifth Circuit's decision in this case. More importantly, there is no conflict with any decision of this Court. The decision below indisputably correctly applied this Court's well settled precedent. Thus, the petition fails to provide any adequate reason for granting the writ. Sup. Ct. R. 10.

STATEMENT OF THE CASE

1. Notwithstanding that vertical minimum price fixing agreements have been illegal *per se* since 1911, Leegin em-

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[1] Congress created express exceptions to the Sherman Act that permitted States to enact laws permitting certain manufacturers to establish minimum retail prices for certain goods. As discussed *infra*, those state "fair trade" laws were ended in 1975 when Congress repealed the exceptions to the Sherman Act that enabled those state laws.

barked on a plan to enter written agreements with its key retailers fixing the resale price of Brighton goods. In 1998, Leegin induced those retailers to sign and return a "Brighton Pledge" form that provided:

> I understand the duties, philosophies, and responsibilities of being a Brighton Heart Store and agree to abide by them. As a Brighton Heart Retailer I pledge to * * * Follow the Brighton Suggested Pricing Policy at all times.

(4 R. 972). In the years that followed, Leegin solicited agreements from retailers, and retailers executed and returned "Brighton Heart Store Agreements" providing that retailers "agree to * * * Sell Brighton products for the suggested price every day, 365 days a year." (4 R. 984). Leegin continued the Heart Store program through the time of trial, requiring "Heart Store" retailers to sign and return a new agreement each year.

Leegin, through its owner, also owned a number of retail outlets that exclusively featured the Brighton line of products. In addition, it licensed a number of other retail stores the right to use the Brighton name as a part of their store name. Leegin requires both its own stores and the independent "Brighton" stores to execute Trademark License agreements. Those agreements bind the licensee to undertake certain obligations and Section 3b states, in part:

> Licensee shall comply fully with all obligations which arise as a customer of Licensor with respect to its purchases of goods, including without limitation Licensor's "Brighton Retail Pricing and Promotional Policy" as in effect and as updated from time to time.

(P. Ex. 114).[2]

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[2] In addition, Leegin required retailers that wished to sell Leegin's luggage to execute a separate "Luggage Agreement" that obligated the retailers to offer that luggage "at the suggested retail price."

Leegin enforced the price fixing agreements against all of its retailers. Jerry Kohl, Leegin's president and owner, testified: "[W]e require every one of our customers, whether they are a Heart Store or a Brighton Collectibles store or a store, as you classify, independent retailers, we require everybody to charge the same price." (5 R. 75-76). Leegin's enforcement efforts took the form of threats to stop shipment, suspensions of shipment pending agreement to raise prices, or, as in Kay's Kloset's case, complete cessation of shipments. (5 R. 83, 6 R. 45-46, 50, 54-56).

Contrary to Leegin's claim, Kay's Kloset established that this series of contracts—and not some "policy"—constituted illegal price fixing that violated the clear and consistent holdings of this Court and that such contracts are illegal *per se*. This case presents a situation in which Leegin made a conscious and determined choice to enter price fixing contracts with retailers across the nation, and to enforce those agreements. Leegin chose this course of conduct despite the clear law that such conduct is illegal *per se*.

2. Not only does Leegin manufacture and sell its merchandise to independent retailers, it owns and operates its largest stores. At the time of the case, Leegin shared common ownership with Brighton Retail, a company that owned fifty Brighton only retail stores, and with Corazon, a company that owned twenty-one retail stores in four states. (5 R. 52, 55). Those seventy-plus stores, along with the Heart Stores, accounted for a substantial share of Leegin's total sales. (5 R. 60, 123). Several of Leegin's stores were in the Dallas, Texas area, and at least one of them competed directly with Kay's Kloset. (10 R. 11).

By operating its own retail outlets in the best locations (i.e., those locations that can support a stand-alone store exclusively dedicated to Brighton products), Brighton became its own best customer at the retail level. Under these circumstances, Brighton's price fixing agreements effectively

constitute a horizontal retailer cartel. Brighton could set the prices above market, and avoid intrabrand competition by securing price-fixing agreements with the largest independently owned stores (e.g., "Heart Store Agreements"). Indeed, there was ample evidence that Leegin was directing a collusive, horizontal scheme to fix prices at the retail level.

The record below shows that Leegin paid for trips for representatives of its largest retailers to meet in Hawaii. Anne Wolfe, one of those retailers, testified about those meetings. In a session led by Leegin, she described a discussion about pricing practices among Brighton dealers. Those present at the session reached a consensus about Leegin's pricing practices. That cartel agreement was then approved by Jerry Kohl, who owned Leegin and its Brighton Stores. (9 R. 119-24). In an e-mail, Jerry Kohl stated: "What we have decided is OK after talking to more than 100 retailers is a birthday Club that on your birthday (or within a short time of your birthday) a consumer can get a discount on 1 piece of merchandise in your store (everything not only Brighton)." (P. Ex. 73). Leegin implemented the agreement in its own stores, and enforced it against all other stores.

Other evidence showed Leegin acting as a hub in a classic spoke-and-hub horizontal price fixing conspiracy, by serving as a middle man to make agreements between competing stores that wanted to engage in price competition. Leegin's sales representative disclosed how Leegin management would "try and work up some agreement from the middle man. I mean, maybe this will blow up and Ann will—they'll discuss it with [retailer] Ann. They'll discuss it with the [retail store at the] airport, you know, make everybody play by the rules." (7 R. 95).

Leegin undertook to suppress competition among retailers in other ways. Jerry Kohl referred repeatedly to this theme in e-mails. For example, he noted that if gift-with-purchase giveaways were permitted, "the other retailers in the area feel

they have to compete and before long its [sic] chaos." (P. Ex. 74). Laura Young, Leegin's second-in-command and the person in charge of the Brighton line, declared that discounting activities would "spread like cancer," (P. Ex. 67) and that retailer competition would result in a situation that is "out of control." (P. Ex. 74).

As a retailer, Leegin had every incentive to undermine competition in the pricing of Brighton products. The manager of Leegin's retail stores testified that fixed minimum price improved Leegin's profitability and helped Leegin's retail stores "be profitable for a long period of time." (9 R. 64-65).

3. Kay's Kloset is a women's specialty store that operated in Lewisville, Texas.[3] Since it opened in 1986, it has been engaged in the retail sale of fashions and accessories. In 1995, Kay's Kloset began offering the Brighton line of products. (7 R. 60). At its own expense, Kay's Kloset advertised and promoted the Brighton brand, spending tens of thousands of dollars on television, newspaper and direct mail ads. (7 R. 61-62). As a result, Kay's Kloset became *the* place to purchase Brighton in its market area. (7 R. 63).

In December 2002, Leegin ceased supplying Brighton products to Kay's Kloset, solely because Kay's was selling Brighton products up to 20% below Leegin's fixed retail price. The *only* reason Leegin ever gave for the termination was that Kay's Kloset was selling Brighton below Leegin's fixed price. (6 R. 50). As a result of Leegin's actions, Kay's Kloset lost substantial profits it would have earned selling Brighton products, which Kay's Kloset had advertised at great expense.

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[3] Since the date of the trial, it has moved approximately two miles to the neighboring town of Flower Mound.

REASONS FOR NOT GRANTING THE PETITION

I. LEEGIN'S RETAIL PRICE FIXING VIOLATED PROHIBITIONS AGAINST HORIZONTAL CARTELS

This case does not present an appropriate vehicle for this Court to revisit *Dr. Miles.* In *Dr. Miles,* the manufacturer defendant was not also an active participant in the retail market implementing a horizontal cartel. No one questions the pernicious effect of retail competitors conspiring to fix prices. That conduct is the archetypal example of actions that are presumed illegal without further examination. *Catalono, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646-47 (1980). Even Leegin concedes that such horizontal agreements among retailers are anticompetitive. *See* Petition, p. 16.

Contracts between competitors are not saved from the *per se* rule of illegality because one of the competitors distributes to the others. In *United States v. McKesson & Robbins*, 351 U.S. 312 (1955), the Court analyzed a dual-distribution system. In that case, a manufacturer who distributed directly to retailers, as well as to wholesalers, entered into agreements with both retailers and other wholesalers to fix the resale price of its goods. Although the agreements with retailers were saved by the provisions of the Miller-Tydings and McGuire Acts then in effect, the agreements with other wholesalers were illegal *per se*. The Court noted that those acts "expressly continue[d] the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level." *Id.* at 313 (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951)). Because the defendant in *McKesson* participated in the wholesale market, its contracts with other wholesalers violated the "*per se* rule of illegality [for] resale price maintenance contracts between firms competing on the same functional level." *Id.* at 315.

Leegin cannot have it both ways. It cannot maintain that vertical price fixing arrangements are benign, while horizontal arrangements are not, and yet maintain that it can fix prices among retailers while at the same time participating in a significant economic manner in the retail market. Such an arrangement violates traditional prohibitions against price fixing among competitors.

The power of Leegin "to fix the price of the product that it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition." *United States v. Masonite Corp.*, 316 U.S. 265, 281 (1942). Price fixing among competitors of a single brand falls within the long-standing prohibition against horizontal cartels. *See United States v. Sealy*, 388 U.S. 350, 356 n.3 (1967). It does not matter whether the prices or pricing practices were discussed and voted on by the entire group: "The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action." *Masonite Corp.*, 316 U.S. at 276. The negative impact on consumers—who pay higher prices—is the same, no matter how a cartel is achieved.

Thus, this case implicates the long-standing prohibitions on both vertical price fixing and horizontal cartels. Permitting Leegin to fix retail prices to benefit its own combined wholesale/retail operation violates the Sherman Act's fundamental prohibition against cartels.

The record below contains compelling evidence of a horizontal cartel designed and intended to benefit Leegin's retail operations. As a result, even were Leegin's conduct not prohibited by the *per re* rule against vertical price fixing, it is a *per se* violation of the Sherman Act's bedrock prohibition on horizontal cartels.

II. THE RULES REGARDING VERTICAL MINIMUM PRICE FIXING ARE WELL ESTABLISHED AND ABSOLUTELY CLEAR.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), this Court held that a manufacturer's contract fixing the retail price of goods constitutes a violation of the Sherman Act. The Court recognized that the suppression of competition among dealers by the manufacturer has the same practical effect as an agreement among the dealers themselves to suppress competition. Such agreements among dealers, however "are injurious to the public interest and void." *Id.* at 384-85. The Court applied the same rule to resale price fixing, holding that once the manufacturer sells its product to a retailer at a price satisfactory to it, "the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." *Id.*

The Court has recognized that the *Dr. Miles* rule is limited to those situations involving contracts. In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), the Court recognized that a manufacturer enjoys the freedom to choose who to deal with, and that he may "announce in advance the circumstances under which he will refuse to sell." *Id.* at 307. The *Colgate* doctrine has provided a vehicle for manufacturers to lawfully exercise some control over resale prices.

The decisions in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) have further defined both the limits of *Dr. Miles* and the *Colgate* doctrine. *Monsanto* established strict requirements on what conduct could constitute a contract, as opposed to mere acquiescence to a stated condition. *Sharp* required that there be an agreement as to price with remaining dealers to fall within the *Dr. Miles* rule. These cases have established an extremely high threshold that a party challenging vertical price fixing conduct must overcome to establish liability. As a result, only

rarely have companies been found to have engaged in prohibited vertical price fixing. It is the most unusual case, such as the present one, where the proof of illegal conduct—such as the written contracts entered by Leegin and its retailers—satisfies the Court's high standards and results in a *per se* violation.

The continuing vitality of the doctrine established by *United States v. Colgate & Co.*, 250 U.S. at 300, as well as the rule of reason standard for non-price vertical restrictions, have extended a great deal of freedom to companies to lawfully arrange their businesses to achieve permissible economies, while obeying the Sherman Act's clear limits on price fixing. The lack of cases challenging the established rules and the absence of any Congressional action to change the *per se* rule demonstrate that this is a highly unusual case and does not raise an issue of everyday importance.

At the federal level, there have been extraordinarily few challenges to resale price maintenance arrangements in the last twenty-five years.[4] The same is true at the state level. One study found that state Attorneys General filed only seven such cases between 1995 and 2004.[5] Even fewer private cases exist. The substantial hurdles a private litigant like

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[4] *See* Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. Chi. L. Rev. 209, 224 (2005) ("During the Reagan years no challenges were advanced against RPM under either a per se or a rule of reason theory. There were a few challenges in extreme circumstances to RPM during the first Bush administration. Then federal enforcement was substantially restored during the Clinton administration, mostly in complaints by the Federal Trade Commission. During the second Bush administration, we find again no challenges to minimum RPM—either under a per se or rule of reason approach.").

[5] *See* Harry First, Statement Before the Antitrust Modernization Commission 22 (Oct. 26, 2005) (transcript *available at* http://www.amc.gov/commission_hearings/pdf/Statement_First.pdf).

Kay's Kloset faces insure that in only those cases, such as this one, where the manufacturer flaunts clear precedent, will any private action even possibly be pursued.[6]

Simply stated, the Fifth Circuit's decision has no widespread impact, and the issues this case raises are neither unsettled nor of particular importance as a practical matter.

III. CONGRESS HAS ENDORSED THE *PER SE* RULE AGAINST VERTICAL MINIMUM PRICE FIXING

In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977), the Court noted that: "[t]he *per se* illegality of price restrictions has been established firmly for many years * * *. Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of individual States." Nothing has changed since 1977 that casts any doubt upon the Court's conclusion that Congress approves of the *per se* illegality treatment of vertical price fixing.

In 1991, in House Report 102-237, Congress recognized its role in selecting the standard governing vertical pricing agreements:

> With the possible exception of merger policy, there is probably no area of antitrust where Congress has displayed such an explicit and abiding intent to set policy for the courts and enforcement agencies as in the

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[6] One commentator characterized the current dealer termination law as "a toothless legal standard, providing a blank check for coercion and exclusionary behavior by powerful dealers openly policed by manufacturers, which is structurally designed to make it difficult if not impossible for injured private plaintiffs to recover." Mark E. Roszkowski, *The Sad Legacy of* GTE Sylvania *and Its "Rule of Reason:" The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act*, 22 Conn. L. Rev. 129, 134 (1989).

> area of resale price maintenance ("RPM"). Following the *Dr. Miles* decision in 1911, Congress has revisited the area of resale price maintenance regularly-almost in clockwork 20-year cycles-with special attention to the empirical effects of the policy on consumers and interstate commerce.

1991 W.L. 206791 at 3 (footnote omitted). The history of legislation in this area further confirms the accuracy of this statement. *See* John F. Seiberling, *Congress Makes the Laws: The Executive Should Enforce Them*, 53 Antitrust L.J. 175, 176-78 (1984).

In 1937, Congress enacted the Miller-Tydings Act, Pub. L. No. 314, ch. 690, Title III, 50 Stat. 693 (1937), which permitted states to authorize manufacturers to enter into agreements with retailers fixing minimum product prices. When the Court held that such agreements could not be enforced against non-signers in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. at 384, Congress responded by enacting the McGuire Act, Pub. L. No. 543, ch. 745, 66 Stat. 632 (1952). Together those two acts allowed manufacturers to enter into minimum price agreements with retailers and to terminate dealers who violated those agreements.

Congress evaluated the lessons learned from the decades of permitted resale price maintenance in the mid 1970s. The Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, repealed the Miller-Tydings and McGuire Acts. At the time it passed the 1975 repeal, Congress noted that legally-sanctioned resale price maintenance resulted in an 18-20% increase in the prices of fair traded goods and that business failures in fair trade states were 55% higher than in non-fair trade states. Senate Comm. on the Judiciary, 94th Cong., Act to Repeal Enabling Legislation for Fair Trade Laws, S. Rep. No. 94-466, at 3 (1975).

Congress intended and expressly recognized that the repeal of these acts would make vertical minimum price fixing

agreements illegal: "Without these exceptions the agreements they authorize would violate the antitrust laws." *Id.* President Ford's signing statement also recognized that the Consumer Goods Pricing Act would "make it illegal for manufacturers to fix the price of consumer products sold by retailers." President Gerald R. Ford, Statement on the Consumer Goods Pricing Act of 1975 (Dec. 12, 1975), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=5432.http://www.presdiencyhttp://presidency.ucsb.edu/ws/index.php?pid=5432.

Congress has since reaffirmed its support for keeping vertical minimum price fixing agreements illegal *per se*. Congress repeatedly has voted to prevent the Department of Justice from using appropriated money to seek to overturn the *per se* treatment of vertical price fixing. Act of Oct. 11, 1983, Pub. L. No. 98-116, 97 Stat. 795; Act of Dec. 19, 1985, Pub. L. No. 99-190, 99 Stat. 1185.

In 1991, some members of Congress sought to adopt, by legislation, a *per se* standard, while at the same time overturning some of the restrictions placed on plaintiffs by this Court in *Monsanto* and *Sharp*. Although bills adopting the *per se* rule passed both houses of Congress, ultimately other differences in those bills resulted in no bill becoming law.

Recently, Congress has been evaluating whether changes need to be made to the antitrust laws. In 2002, Congress established the Antitrust Modernization Commission. *See* Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, 116 Stat. 1856 (2002). That Commission convened in 2004 and solicited comments from interested parties. Some advocates opined that vertical restrictions should be tightened, while others argued that resale price maintenance either should be legalized or governed by the

rule of reason standard. Still others believed in preserving the status quo.[7]

In January 2005, the Antitrust Modernization Commission decided that there was no need for a legislative change in the standard. This conclusion was reached based upon the differing opinions about whether treatment of vertical price fixing was too strict or too lenient, and "Congressional support year in, year out for maintenance of the *per se* rule." *See* Transcript of Jan. 13, 2005 Meeting, Antitrust Modernization Commission, http://www.amc.gov/pdf/meetings/051113_Meeting_Transcript_reform.pdf.http://www.amc.gov/pdf/meetings/Single-FirmConduct.pdf.

In a concurrence to *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), Justice Brennan noted that the Solicitor General urged that *Dr. Miles* be overruled. In his concurrence, Justice Brennan stated:

> That decision has stood for 73 years, and Congress has certainly been aware of its existence throughout that time. Yet Congress has never enacted legislation to overrule the interpretation of the Sherman Act adopted in that case. Under these circumstances, I see no reason for us to depart from our longstanding interpretation of the Act.

Id. at 769.

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[7] Robert H. Bork commented: "The antitrust laws, in my opinion, are performing well, in fact better than at any time in the past seventy-five years. It follows that there is very little need for 'modernization.'

"This is not to say that all cases are being decided correctly, but such mistakes as are being made are due more to the human element, which can never be eradicated, than to any systematic flaws in antitrust doctrine." Memorandum from Robert H. Bork to the Antitrust Modernization Committee 1 (no date) (on file with author), *available at* http://www.amc.gov/comments/bork.pdf.

In *Flood v. Kuhn*, 407 U.S. 258 (1972), the Court considered the propriety of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), the case establishing an exemption from the antitrust laws for professional baseball, and *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), which had reaffirmed *Federal Baseball*. In refusing to overturn these cases, the Court stated:

> We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

Kuhn, 407 U.S. at 283-84. The remedy, if any, was for Congress, and not for the Court.

Given Congress's even longer, and more active role in setting antitrust policy in the area of resale price maintenance than in the area of the baseball exemption, a more compelling case exists for deferring to Congress to change the law, should any change be needed. In light of Congress's longstanding and current approval of *per se* treatment of minimum vertical price fixing, it is both inappropriate and unnecessary for this Court to revisit *Dr. Miles*.

IV. MODERN ECONOMIC ANALYSIS DOES NOT SUGGEST RECONSIDERING THE *PER SE* RULE

Economists and "law and economics" scholars have given some attention to the issue of Resale Price Maintenance in the last twenty years. Importantly, their conclusions have not validated the pure Chicago School approach Leegin advocates in its Petition:

> [U]nder post-Chicago antitrust analysis, the market has become a far messier place. The post-Chicago economic

> literature has produced impressive arguments that certain market structures and certain types of collaborative activity are much more likely to have anticompetitive consequences than Chicago School antitrust writers imagined.

Herbert Hovencamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 270 (2001).

Instead, collective experience includes many instances when the elimination of resale price maintenance has led to significant savings for consumers. For example, brand name soft white light bulb prices fell more than thirty percent between 1980 and 2002, following the elimination of resale price maintenance and other vertical restrictions; experience in the United Kingdom, France and Sweden showed that retail price maintenance impeded the growth of low-cost, low margin distributors; the elimination of resale price maintenance is associated with a decline in margins by drug stores—margins have dropped from the traditional 40% level to 20%; and ending Levi Strauss's resale price maintenance in 1976 resulted in annual gain in consumer surplus exceeding $200 million for men's jeans alone. F.M. Sherer, *Comment on Cooper et al.'s "Vertical Restrictions and Policy,"* Competition Pol'y Int'l, Autumn 2005, at 65, *available at* http://www.esapience.org/render_cms_image.aspx?item=Id611&detailID=151.http://www.esapience.org/render_cms_image.aspx?item=Id611.

Numerous anticompetitive explanations for resale price maintenance are now recognized. These include the ability of such restrictions to facilitate cartelizing a market, *i.e. Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. at 51 n.18, which may well have been Leegin's goal in this case.

The elimination of intrabrand competition leads to a number of potential problems. *First*, increased efficiency available from price flexibility is eliminated. For example, Leegin's national system of price controls prevented prices

from reflecting local conditions or temporal changes in demand. *See* VIII Phillip E. Areeda, *Antitrust Law* ¶1631a5 (1989) (noting that price stability "is hardly a worthy object for antitrust law. Although price instability and confusion may occasionally impose costs on society, price stabilization remains generally pernicious.").

Second, resale price maintenance has been associated with the preservation of outmoded means of distribution. The existence of a guaranteed margin provides retailers with little incentive for innovation in their retail practices.[8]

Third, manufacturers are shielded from competitive pressure that could arise from vigorous competition among the retailers of the manufacturers' products. If a manufacturer cannot guarantee a retail margin, a manufacturer may have to engage in price competition with other manufacturers to attract retailers for its product. Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 Geo. L.J. 1487, 1492 (1983).

Fourth, providing a guaranteed margin on sales of one brand to a retailer can induce the retailer to pressure consumers to move from other products that better fit consumers' needs to the favored brand. Such behavior is not the result of an efficient market. Areeda, *supra*, ¶1601, at 15.

Fifth, to the extent that resale price maintenance leads to a competitive increase in retailer services, some customers will receive unnecessary and unneeded services, making them worse off because they are forced to pay for unwanted services. William S. Comanor, *Vertical Price-Fixing, Ver-*

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[8] Robert L. Steiner, *The Evolution and Applications of Dual-Stage Thinking*, XLIX The Antitrust Bull. 877, 899 (2004) ("The greatest social welfare loss from (voluntary) vertical restraints * * * has arisen from * * * vertical price restraints that have historically retarded the growth of a series of new and more efficient forms of retailing * * *.").

tical Market Restrictions, and the New Antitrust Policy, 98 Harv. L. Rev. 983, 999 (1985).

Much attention has been given to the question of whether these recognized inefficiencies can be reliably cured by interbrand competition. Reliance on interbrand competition seemed to underlie the Court's holdings in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. at 36. The picture that emerges from much of the work analyzing the economics of product differentiation and distribution presents a much more complex situation than contemplated in *Sylvania.* The belief that all markets will address any artificial anticompetitive behavior is no longer accepted. Today, "few Chicago school advocates would say that vertical restraints are never harmful." Pamela Jones Harbour, *An Enforcement Perspective on the Work of Robert L. Steiner: Why Retailing and Vertical Relationships Matter*, XLIX The Antitrust Bull. 985, 997 (2004).

In *Sylvania* the Court stated that interbrand competition "provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." 433 U.S. at 53 n.19. Subsequent research has disputed this claim. Research has shown that "the more competitive is interbrand competition among manufacturers, the less competitive is intrabrand competition likely to be and the larger the markups in the distribution sector." Steiner, *supra*, at 898. *See also* Michael P. Lynch, *Why Economists are Wrong to Neglect Retailing and How Steiner's Theory Provides an Explanation of Important Regularities*, XLIX The Antitrust Bull. 911, 927-29 (2004) (showing how retail margins on leading brands are smaller than margins on store brands).

In addition to the question whether resale price maintenance reduces efficiency, other competing policies are implicated. Resale price maintenance involves a shift in

wealth from consumers to producers. Thus, resale price maintenance involves a decrease in consumer welfare.

Even Leegin's authorities recognize that "when a manufacturer successfully discourages its retailers from discounting, the higher quasi rents it reaps come at consumers' expense and that merchandise that might have been sold ends up being destroyed." David A. Butz, *Vertical Price Controls With Uncertain Demand*, 40 J.L. & Econ. 433, 456 (1997).

These recent insights demonstrate that pure Chicago School thought places too much faith in the ability of markets to correct anticompetitive actions:

> Chicago antitrust economics was oversold. If markets are not as elegant as Chicago economists assume, if information and switching costs are in fact quite high, if proportions can be varied, if products are durably differentiated, then markets can in fact be anticompetitive over a variety of circumstances that Chicago economists generally disallowed.

Hovenkamp, *supra*, at 268.

As a result, scholars recognize that the legal standards governing vertical conduct cannot and should not be dependent solely upon economic analysis:

> Firms will get away with welfare-reducing practices if competition policy is too lenient, and they will be discouraged from engaging in welfare-enhancing practices if it is too strict. Sound policy must thus begin with an assessment of the likelihood and cost of the two types of mistakes. Policymakers must then devise rules that minimize the expected costs of these errors and make antitrust enforcement predictable for businesses.

David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73, 80 (2005). "In the interests of judicial economy * * * it may be more expeditious to set

general policy standards, even though they will sometimes lead to improper results." Comanor, *supra*, at 1001.

Rather, economic analysis lacks the tools and sophistication to assess accurately the efficiency aspects of resale price maintenance in a market such as fashion, a market characterized by a high degree of product differentiation. But the obvious and inevitable impact of resale price maintenance—recognized by everyone—is that *consumers pay more*. Under these circumstances, the permissibility of vertical price fixing must be guided in large part by past experience and common sense, precisely the considerations upon which the *per se* rule of *Dr. Miles* relies. Indeed, it is imperative to safeguard practices that result in lower consumer prices, since "cutting prices to increase business often is the very essence of competition." *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

V. *STARE DECISIS* PRINCIPLES COUNSEL AGAINST REVISTING *DR. MILES*

Given all of the foregoing reasons, general principles of *stare decisis* counsel against revisiting the *Dr. Miles* rule. As Justice Breyer observed last term:

> The Court has often recognized the "fundamental importance" of *stare decisis*, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody. *See Harris v. United States*, 536 U. S. 545, 556–57 (2002) (plurality opinion) (citing numerous cases). The Court has pointed out that *stare decisis* "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *United States v. International Business Machines Corp.*, 517 U. S. 843, 856 (1996) (quoting *Payne v. Tennessee*, 501 U. S. 808, 827 (1991)). *Stare decisis* thereby avoids the instability and unfairness that ac-

> company disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.

Randall v. Sorrell, 126 S.Ct. 2479, 2489 (2006). *See also Rasul v. Bush*, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting) ("Departure from our rule of *stare decisis* in statutory cases is always extraordinary * * *.").

Dr. Miles has been the law since 1911. Leegin's Petition raises a question that has not only been decided, it has been settled law for ninety-five years. As recently as 1997, this Court has reiterated that agreements to fix minimum prices "remain illegal *per se*." *State Oil Co. v. Khan*, 522 U.S. at 17. *See also NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998) (recognizing vertical pricing conduct falls within scope of *per se* rule). The reasons for applying the doctrine of *stare decisis* are compelling here. "Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades." *IBP, Inc. v. Alvarez*, 126 S.Ct. 514, 523 (2005).

Furthermore, Congress has been active in this area and its intent is clear. Indeed, in *Sylvania*, this Court recognized that Congress repeatedly had expressed its approval of the *per se* rule. And Congress's actions since 1977 only affirm its support for the *per se* rule.

Ultimately, the *Dr. Miles* rule is clear and easily enforceable. And it is consistent with modern economic analysis. Rule of reason analysis—which Leegin proposes in its Question Presented—would eliminate this clarity and inevitably result in substantial harm to consumers who will pay

higher prices. No "compelling reason" requires that result nor this Court's review of the issue. Sup. Ct. R. 10.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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